No. 87-911

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CONTINENTAL GROUP, INC., CONTINENTAL CAN COMPANY, INC., CONTINENTAL PACKAGING COMPANY, INC., and KMI CONTINENTAL INC.,
Petitioners,

v.

CECIL McLENDON, DON VANDERTULIP, JIMMIE CARTHARN, JR. and KONRAD TROJNIAR, on their own behalf and on behalf of all others similarly situated,
Respondents,

and

HONORABLE H. LEE SAROKIN, United States District Judge for the District of New Jersey,
Nominal Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Will certiorari lie from the denial of a writ of mandamus where (a) the court below has not addressed the questions presented by the petition for certiorari and (b) the petition does not assert a claim of abuse of discretion in the denial of the writ of mandamus?

2. After a determination of liability in favor of a plaintiff class on an admittedly equitable (nonjury) claim, may a trial court proceed to conclude the remedy phase of that claim for class members prior to resolving independent legal claims triable by jury?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents submit this brief to demonstrate that the petition for writ of certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

Petitioners contest a decision of the Third Circuit rejecting their petition for the extraordinary relief of mandamus. In its entirety, that decision states: "The foregoing Motion is denied" (Pet. App. A-1). Petitioners had filed the petition to seek review of various of the trial court's interlocutory rulings, rulings which they admit were not subject to appeal.

The rulings followed the trial court's entry of a partial summary judgment that petitioners had committed a classwide violation of ERISA's Section 510, 29 U.S.C. §1140. (The petition does not challenge the propriety of that liability judgment.) The rulings established the procedures by which the trial court would fashion the relief to remedy the classwide violation. All of this is under a statute which does not provide for trial by jury; petitioners concede that a Section 510 action is purely equitable in nature.

Congress enacted ERISA in 1974. While most of ERISA's provisions are addressed to protecting the interests of employees who have already become entitled to benefits under an employee benefit plan, Congress also included the quite distinct prohibition that appears in Section 510, *viz.*, that "it shall be unlawful for any person to discharge . . . or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . ."

During the 1970s, petitioner Continental Can Company (hereinafter "Continental") adopted a company-wide program to accomplish precisely what Section 510 forbids. The facts of that program set forth in the following para-

graphs are taken from the Third Circuit's opinion in *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 495 (1987). It was the decision in *Gavalik* which, through the principles of collateral estoppel, provided the basis for the partial summary judgment in the instant case. The Solicitor General has previously told this Court in an *amicus* brief filed in *Gavalik*, that "[t]here is no question that Section 510 prohibits precisely the kind of scheme that Continental devised here."[1]

1. Called a "liability avoidance" program in Continental's internal documents, the program's purpose was to prevent employees who had not already qualified for certain pensions ("shutdown pensions") from ever qualifying for those pensions. This was done by removing employees from the workforce before they had accumulated the age and service necessary to vest entitlement to such pensions. (*Gavalik* at 840.)

2. Through an elaborate computer study, Continental identified, at the plants with greatest potential pension liability, those employees whose combined age and service did not yet qualify them for shutdown pensions (*id.* 841).

3. A "cap" was placed on the size of the workforce at such plants, limiting the workforce almost exclusively to employees who *already* had qualified for shutdown pensions (*id.* 840).

4. Employees outside the cap were laid off from work, and were designated in the Company's records (albeit they were not told this) "permanently laid off." An employee

[1] P. 18 of Brief For The United States As Amicus Curiae, filed in November 1987 in No. 86-1659 in response to the Court's invitation.

so designated was not to be recalled to work under any circumstances without the approval of top management at corporate headquarters. (*Id.* 840.)

5. A "red flag" system was instituted to assure that employees designated "permanently laid off" would not inadvertently be recalled to work and thus allowed to qualify for shutdown pensions (*id.* 841).

6. Whereas prior to institution of this program plant managers had been instructed to adjust employment levels to whatever was necessary to accomplish the business available to the plant, the volume of business at the plant was now adjusted to accommodate the cap on employment levels dictated by the "liability avoidance" program. Additional work, if it could not be accomplished by having already-qualified employees work overtime, was to be referred to other plants of the Company or contracted out. (*Id.* 840.)

7. The Company had by design kept the existence of its liability avoidance program secret from the employees and their union (*id.* 840).

The Pittsburgh (Gavalik) Litigation

The *Gavalik* litigation is a class action brought on behalf of employees of Continental's Pittsburgh plant. Following a lengthy trial, the district court in Pittsburgh found that Continental in fact had adopted the company-wide liability avoidance program described above and had implemented it at the Pittsburgh plant, and in adopting and implementing the program had been motivated by a desire to prevent the employees from qualifying for shutdown pensions (*id.* 842). Nevertheless, the district court entered judgment for Continental, finding that, insofar as the Pittsburgh plant was concerned, the Company had also been

motivated by declining business and that the plaintiffs had failed to prove that they would not have been laid off even in the absence of the pension-avoidance motive (*id.* 842).

The court of appeals reversed, and remanded for further proceedings. The court found two fundamental errors in the district court's disposition of the merits. First, the court of appeals reasoned that the district court's findings established that Continental had engaged in a classwide violation of Section 510. The district court had found that Continental developed a program to make employment decisions based upon a statutorily forbidden criterion (*id.* 856-57). Citing and following *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the court of appeals held that Continental's discriminatory program was a classwide violation that entitled the class to an injunction against the program's continued operation (*Gavalik* at 857).

Second, as to the plaintiff class members' entitlement to individual relief, the court of appeals ruled that the district court had erred by placing the burden on plaintiffs to prove that but for Continental's illegal program they would not have been laid off. (*Id.* 859-65.)

The Present Litigation

The *Gavalik* litigation, as indicated, involves employees of only one of Continental's plants: the Pittsburgh plant. The present lawsuit, in which plaintiffs assert both ERISA and RICO claims, was brought on behalf of employees covered by the same Pension Agreement at more than fifty other Continental plants. A plaintiff class was certified, encompassing employees of those plants. As of this date, more than 2,000 such employees have been identified as class claimants.

The *Gavalik* findings, through the doctrine of collateral estoppel, enabled the trial court in the present action to enter summary judgment that Continental's company-wide liability avoidance program, which is involved in both cases, constituted a classwide violation of ERISA. *McLendon v. Continental Group, Inc.*, 660 F.Supp. 1553 (D.N.J. 1987). Thus, as to the ERISA claim, all that remained was for the trial court to fashion appropriate equitable relief for the class consisting of more than 2,000 individuals. The trial court determined it would address these equitable (nonjury) remedy questions prior to trial of plaintiffs' RICO claims to a jury.

The trial court made this determination, as petitioners concede (Pet. 11-12), after plaintiffs agreed that the results of the bench trial of the ERISA remedial phase would have no collateral estoppel effects as to the RICO claims.

On this record, and noting defendants' nonentitlement to a jury trial under ERISA and the daunting complexity which would occur were a jury asked to determine in a single trial not only 2,000 ERISA remedial claims but 2,000 RICO liability claims as well, the trial court rejected petitioners' request for such a single jury trial (Pet. App. A-18).

Petitioners thereupon moved the Third Circuit to issue the extraordinary relief of mandamus. Without inviting any response to the motion, the Third Circuit disposed of it in one line: "The foregoing Motion is denied."

REASONS FOR DENYING THE WRIT

For three reasons, certiorari is inappropriate here. First, petitioners cannot show that the court of appeals decided the questions they seek to present. Indeed, the court merely denied their petition for mandamus. That remedy is so extraordinary that a petitioner must satisfy a number of hurdles—and must do so clearly and indisputably—before he can claim it. It is likely that Continental's petition for mandamus foundered on one of these preliminary issues and, thus, the decision below would raise none of the issues petitioners portray as presented here.

Second, even had the Third Circuit clearly addressed the jury contentions and thus determined the questions petitioners describe, the unique facts of this case raise a host of subsidiary issues depriving it of any general import. Petitioners concede not only the summary, classwide liability judgment. They concede that all that remains on plaintiffs' ERISA claims is fashioning the equitable relief which will remedy that violation. They concede that the ERISA statute does not provide for trial by jury of these claims. They concede, finally, that the class members will invoke no collateral estoppel effects from any ERISA-remedy findings in trying the RICO claims. These facts and the unique posture of this case cause the instant petition to be without constitutional import.

Finally, were petitioners able to isolate a constitutional issue, this Court's decision in *Parklane* would resolve it. *Parklane* taught that the principles which order the sequence of legal and equitable trials are "no more than a general prudential rule." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 334 (1979). Given the complexity of the task that remains in determining the ERISA remedies

for the 2,000-plus class members, given the enormous additional complexity which would result from combining this task with the class members' RICO claims in a single jury trial, and given that these class members have waived any claim of issue preclusion, the trial court's determination to fashion the ERISA remedies prior to dealing with the RICO claims clearly conforms with that prudential rule.

I.

PETITIONERS HAVE NOT DEMONSTRATED THAT THE COURT OF APPEALS DECIDED THE QUESTIONS THEY CLAIM TO BE PRESENTED.

The court of appeals disposed of petitioners' petition for a writ of mandamus in five words: "The foregoing Motion is denied." Mandamus is a "drastic" remedy, justified only in "exceptional circumstances, amounting to a judicial usurpation of power." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 35 (1980). Mindful of its extraordinariness, courts have crafted a number of strict prerequisites a litigant must satisfy before he can claim the writ. The litigant must show he has no other available remedy and that his entitlement to mandamus is both clear and undisputable. *Id.* at 35; *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953).

The five words of the Third Circuit's decision do not disclose why the court denied the petition for a writ of mandamus. Most probably, the court determined that petitioners had not clearly and indisputably satisfied one or another of the myriad of prerequisites.[2] Were that the

[2] The Third Circuit denied the petition within days of its filing and without seeking a response from the plaintiffs. This summary treatment strongly suggests that the court reached its decision without reaching the merits.

case, then the instant petition for a writ of certiorari would raise neither of the questions it purports to present. Indeed, the only proper petition would be one presenting a question which this petition does *not* pose: Did the Third Circuit abuse its discretion in refusing to grant the extraordinary writ of mandamus on the particular and unique facts of this case?

Since petitioners cannot even show that the questions they would present to this Court were decided below, certiorari is inappropriate.

II.

THE UNIQUE FACTS OF THIS SITUATION DO NOT PRESENT ANY CONSTITUTIONAL QUESTION.

The uniqueness of this situation is readily apparent. It is a major employment discrimination class action, involving thousands of class members, in which the class achieved summary judgment as to their employer's liability. Thus, only remedial determinations remain before the ERISA action is complete. Plaintiffs have foreclosed the possibility that ERISA remedial findings would prejudice petitioners' RICO defense through their agreement that they will not invoke collateral estoppel based on those findings with respect to their RICO claims.

No constitutional issue arises from these singular facts. The ERISA action is purely equitable and, taken alone, carries no right to a jury trial. Since petitioners admit this much, they are forced to contrive an intricate argument to support their jury demand: though the plaintiffs have waived collateral estoppel, it is possible that the trial court will enter ERISA remedial findings that do not conform entirely to the subsequent RICO jury verdicts. Such inconsistency, petitioners conclude, offends against the sound administration of justice.

Three considerations undermine this argument. First, as the petition itself acknowledges, although obscurely, petitioners' question concerning the sound administration of justice is not a constitutional question. *See* discussion of *Heyman* decision in section III.A *infra*. No matter how ingeniously petitioners attempt to cloak their argument with a constitutional mantle, it is not an argument about petitioners' constitutional right to a jury trial—none exists here.

Second, petitioners' argument assumes two future events that may never occur. Petitioners assume, for one thing, that there will be RICO jury verdicts. But any number of possibilities could prove the error in that assumption. Either before or after the ERISA remedy trial, the action could resolve through settlement. Petitioners next assume that any subsequent RICO verdicts would be inconsistent with the ERISA remedial findings. Not only is this wholly speculative, there is little chance of such inconsistency. Even a no-damage verdict would not on its face conflict with an ERISA remedy. A verdict for petitioners could mean that the jury found no liability under RICO or that a class member, though establishing liability, had not established damages.

Beyond these flawed assumptions lies one final error in the argument on which petitioners base their claim to mandamus. Mandamus issues only where no other remedy exists. Here, however, another remedy exists even if (1) inconsistent findings arose and (2) a court concluded that sound jurisprudence could not withstand the inconsistency. That remedy, of course, is a normal appeal. The availability of appeal provides petitioners their adequate remedy and precludes mandamus.

In the final analysis, the unique circumstances of this case make it a poor vehicle to resolve questions of a wider

scope. On the contrary, review could do little more than settle the precise matters at issue here.

III.

THERE IS NO CONSTITUTIONAL QUESTION AND NO RELEVANT CONFLICT AMONG THE CIRCUITS.

The factors discussed in sections I and II above establish that no constitutional question is presented by the petition. There are other reasons as well.

A. The *Heyman* Decision, Relied On By Petitioners, Shows That No Constitutional Question Is Presented.

That no constitutional question is presented here is shown by the petition itself. At page 14, it highlights the Second Circuit's decision in *Heyman v. Kline*, 456 F.2d 123 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972). That decision, the petition acknowledges, held that there was "no infringement upon the seventh amendment guarantee" there because, as petitioners put it, "the appellee . . . agreed to waive any collateral effects of the lower court's findings as to those claims to be tried by a jury."

The facts of the instant case present an *a fortiori* situation, since here the respondents have agreed to such a waiver *prior* to any trial, while in *Heyman* the waiver was not offered until the case had reached the court of appeals *after* trial.[3]

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[3] Although the point is immaterial with respect to the instant petition, we would point out that the *Heyman* ruling that, notwithstanding that no constitutional question was presented, the equitable and legal claims in that case were still required to be tried together because of "the need to avoid conflicting adjudications (involving the same parties)" is readily explainable because, unlike

(Footnote continued on following page)

B. There Are Broader Reasons Why No Constitutional Question Or Relevant Conflict Among The Circuits Is Presented.

On a broader basis, the most important question to be asked to determine if such a conflict or constitutional question is presented here is whether the court decisions relied on by petitioners occurred before or after this Court's decision in *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322 (1979).[4] The instant petition impliedly concedes the importance of *Parklane*, since its only references to that decision, at pp. 8-9, fail to address the aspects of the decision which are dispositive here (and which respondents emphasized in the district court as being dispositive).

Under *Parklane*, plaintiffs' agreement in the district court that the findings in the ERISA remedies trial would not have any binding or estoppel effect as to the RICO claims concludes the issue. This Court went to some length in *Parklane* to make it clear that a trial court is not without discretion to determine the sequence of trials, characterizing the rule enunciated in *Beacon Theatres* as "no more than a general prudential rule." *Id.* at 334. On this point, see *Ritter v. Mount St. Mary's College*, *supra*, at 991. Moreover, the Court made clear the inapplicability

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[3] *continued*
the situation in the instant case, the equitable and legal aspects in *Heyman* pertained to the same claims, in effect. In that case, both the plaintiff's claim and the defendant's counterclaim were for breach of the same contract, making directly conflicting determinations a very real possibility.

[4] On the decisive importance of *Parklane*, see *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 990-91 (4th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 260 (1987).

of the decisions in *Beacon Theatres* and *Dairy Queen*,[5] relied on by petitioners, to the instant facts, pointing out that the objective of those decisions was to prevent collateral estoppel effect from depriving a party of the right to a jury trial (*Parklane* at 334):

> Recognition that an equitable determination could have collateral-estoppel effect in a subsequent legal action was the major premise of this Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988. . . .
>
> * * * *
>
> It is thus clear that the Court in the *Beacon Theatres* case thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by *res judicata* or collateral estoppel. To avoid this result, the Court held that when legal and equitable claims are joined in the same action, the trial judge has only limited discretion in determining the sequence of trial and "that discretion . . . must, wherever possible, be exercised to preserve jury trial." *Id.* at 510, 79 S.Ct., at 956. [Footnote omitted.][6]

This was the rule that the Court characterized as "no more than a general prudential rule." That rule, of course, is inapplicable here because of respondents' agreement as to no collateral-estoppel effect from the court's ERISA findings.

However, the rule would not have required a jury trial first even if no such agreement had been proffered, be-

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[5] *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

[6] The Court's footnote to this statement equated the *Dairy Queen* decision with *Beacon Theatres* in this regard.

cause any "prudential" determination of trial sequence in the case at bar would support the district court's decision to bench-try the remedial phase of the ERISA claims first.[7] In this connection, *Parklane* also states expressly that there are situations where it is proper to give an equitable determination collateral-estoppel effect with respect to legal claims—and that is exactly what the Court sanctioned in *Parklane*. It would seem self-evident that if collateral-estoppel effect were approved in *Parklane*, where there were no special problems of complexity and the like, the facts here present a true *a fortiori* situation. On this point, see *Ritter v. Mount St. Mary's College*, *supra*, at 990-94.

For similar reasons, there is no conflict among the circuits warranting the Court's intervention. The only circuit decision cited in the petition as applying the "correct" rule is *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976), *aff'd on other grounds sub nom Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). That decision cannot create such a conflict because it is pre-*Parklane* and because of its particular, distinctive facts.

[7] The district court cited "the complexity of this matter" in concluding that the court "possesses the discretion to proceed in this fashion"—that is, to try the ERISA remedial phase prior to the RICO claims (Pet. App. A-18).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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